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No._____

**IN THE SUPREME COURT**
**OF THE UNITED STATES**

BRUCE MOORE, Petitioner

v.

STATE OF CALIFORNIA, Respondent

On Petition For A Writ of Certiorari
To The Court of Appeal
Of The State Of California

# PETITION FOR WRIT OF CERTIORARI

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October , 2000

41 pp

## QUESTIONS PRESENTED

Whether a sentence of 135 years to life in prison for multiple robbery and assault convictions arising out of a single robbery incident constitutes cruel and unusual punishment under the Eight Amendment if the sentence is imposed under a state's "three strikes" law and if the prior "strikes" are based upon juvenile adjudications rather than adult felony convictions.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 2000

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BRUCE MOORE, Petitioner

v.

STATE OF CALIFORNIA, Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

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Petitioner Bruce Moore hereby petitions for a Writ of Certiorari to the Court of Appeal, State of California, Second Appellate District, Division Four.

## OPINIONS BELOW

The unreported opinion of the Court of Appeal, State of California, Second Appellate District, Division Four, affirming the judgment against Petitioner was filed on January 31, 2000 and is attached hereto as Appendix A. The unreported order of the California Supreme Court dated April 19, 2000 which announced the denial of Petitioner's timely Petition for Review is attached hereto as Appendix B.

## JURISDICTIONAL STATEMENT

On January 31, 2000, the Court of Appeal, State of California, Second Appellate District, Division Four, affirmed Petitioner's
conviction and sentence in an unpublished opinion. A timely Petition for Review filed with the California Supreme Court was denied on April 19, 2000, with one Justice voting for review. The jurisdiction of this Court arises under 28 U.S.C. section 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The Eight Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

## STATEMENT OF THE CASE

Petitioner was convicted of five counts of second degree robbery with personal use of a firearm and five counts of assault with a semiautomatic firearm with findings that he had personally used a handgun as to all ten counts. (Appendix A, page 2a). The crimes of which Petitioner was convicted arose from what the Court of Appeal described as a "take over" robbery of employees at a fast food restaurant in Los Angeles on January 8, 1998 during which money was obtained from the register and sales from the drive-through window. (id).

In a second phase of the trial, Petitioner was then found to have suffered two prior convictions under California's three strikes law. Both were juvenile adjudications. (id). The first adjudication involved a robbery and an assault with a stick by Petitioner on August 11, 1988. (Appendix A, pages 3a, 10a-11a). The second involved a robbery on October 26, 1989. (id., 4). Firearm use was not alleged in either instance. (id., 10a-11a).

Petitioner Moore was sentenced to 135 years to life in prison under California's three strikes law. (Appendix A, page 2). The Court of Appeal upheld the propriety of treating his prior juvenile adjudications as strikes. (Appendix A, pages 5a-13a).

The Court of Appeal addressed and rejected Petitioner's federal claim under the Eighth Amendment to the United States Constitution on pages 13-15 of its unreported opinion. (The issue was raised in

Appellant's Opening Brief at page 26).

## REASONS FOR GRANTING THE WRIT

In Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed. 2d 382 (1980), this Court upheld the constitutionality of a term of life imprisonment for a defendant who had suffered two prior adult felony convictions each of which had been followed by a state prison commitment. The question presented by this case is whether a sentence of 135 years to life in state prison is constitutional when imposed under a state's three strikes allowing two juvenile adjudications to be treated as strikes. This question has not been answered by the Supreme Court.

Rummel upheld the punishment at issue in that case on the ground that recidivists have demonstrated "criminal propensities" justifying their "isolation from society." The Court wrote:

> "[T]he interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law. . . .
>
> ". . .

> ". . . The purpose of a recidivist statute . . . [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." (Rummel, 445 U.S., 276, 284).

The rationale invoked in Rummel does not apply, however, to
situations in which the prior offenses give rise to juvenile adjudications. Juveniles are not sentenced to prison and are deemed to be wards of the court rather than criminals requiring punishment. This Court placed special emphasis in Rummel upon the role of prior prison confinement as a justification for a life sentence following a third felony conviction. The Court wrote:

> ". . . [A] recidivist [in Texas] must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released. One in Rummel's position has ben both graphically informed of the consequences of lawlessness and given an

> opportunity to reform, all to no avail." (Rummel, supra, 445 U.S., 278).

The Supreme Court's analysis in Rummel therefore does not establish the constitutionality of Petitioner's sentence under the Eighth Amendment prohibition against cruel and unusual punishments.

This is all the more clear in light of an additional circumstance which differentiates the instant case Rummel. As a practical matter, Petitioner's sentence of 135 years to life is a de facto sentence of life without the possibility of parole. Yet this Court's opinion in Rummel specifically addressed Rummel's eligibility for release on parole as a circumstance contributing to its conclusion that his sentence passed constitutional muster. The Court wrote:

> "We agree with Rummel that his inability to enforce any 'right' to parole precludes us from treating his life sentences as if it were equivalent to a sentence of 12 years. Nevertheless, because parole is 'an established variation on imprisonment of convicted criminals, Morresey v. Brewer, 408 U.S. 471, 477 [92 S.Ct. 2593, 2598, 33 L.Ed. 2d 484] (1972), a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life. If nothing else, the possibility of parole, however, slim, serves to

> distinguish Rummel from a person sentences under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony. [citation]." (Rummel, supra, 445 U.S., 290-291).

Therefore, the fact that Petitioner's sentence in this case is tantamount to a sentence of life in prison without the possibility of parole cannot be ignored in assessing that sentence's constitutionality.

In this case, the Court of Appeal upheld the constitutionality of Petitioner's sentence in reliance upon this Court's decision in Rummel. The Court of Appeal failed to address the fact that Petitioner Moore's sentence of 135 years to life was based upon prior juvenile adjudications rather than upon prior adult felony convictions. (Opinion, 13-17). The distinction is critical given Rummel's rationale, which upholds recidivist sentencing predicated upon adult felony convictions that have given rise to prison sentences.

Rummel v. Estelle is not the only case in which this Court has addressed the relevance of a no-parole sentence in a constitutional context. In Solom v. Helm, 463 U.S., 277, 103 S.Ct. 3001, 77 L,.Ed. 2d 637 (1983), the Supreme Court affirmed a grant of federal habeas corpus relief to a petitioner who had been sentenced to life in prison without parole after his seventh non-violent felony conviction. The Court specifically held:

> "There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences." (id., 463 U.S., 288).

The Court in Solom v. Helm specifically referred to the unavailability of parole as a circumstance supporting the sentence's unconstitutionality, rejecting the suggestion that the possibility of commutation was "sufficient to save an unconstitutional sentence." (Id., 296).

Solom v. Helm is illuminating for yet another reason. While the Court of Appeal in this case focused entirely upon the crimes giving rise to Mr. Moore's adult convictions as justifying his sentence, (Appendix A, page 18a), the Court in Solom specifically noted that Halm's "prior offenses, although classified as felonies, were all relatively minor." (id., 297). The principle established in Solom v. Helm and ignored by the Court of Appeal below that a defendant's "status . . . cannot be considered in the abstract [separated from consideration of h]is prior offenses" (id., 296-297) inures to Moore's benefit. For in contrast to defendant Helm, Petitioner suffered only prior juvenile adjudications. Yet it was these adjudications that made Petitioner eligible for his massive sentence under California's three-strikes law. While Halm suffered a no-parole life sentence because of a lengthy history of adult felony convictions, Petitioner Moore now suffers a comparable fate because of a history of juvenile adjudications preceding the charged offenses, all of which arose out of a single

incident.

In Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2683, 115 L.Ed. 2d 836 (1991), this Court upheld the constitutionality of a mandatory life-without-parole sentence for a person who, without having suffered prior felony convictions, was convicted of possessing 650 grams of cocaine. Harmelin does not establish the constitutionality of Petitioner's Moore's conviction, however. The reason is that Petitioner Moore's sentence is based upon his status as a third-striker under California's law. The prior "strikes" were juvenile adjudications. In contrast to the situation in Harmelin, the present case does not involve a de-facto life-without parole term based solely upon a particularly serious felony conviction. Instead, Petitioner Moore's sentence is based upon two juvenile adjudications which provided the foundation for his sentencing as a third-striker under the State's three strikes law.

The question presented by this case is whether Bruce Moore's sentence satisfies constitutional requirements. As the foregoing discussion demonstrates, this Court's prior decisions do not justify the use of juvenile adjudications as the foundation for imposition of a de-facto life-without-parole sentence under circumstances in which such a sentence would not otherwise have been imposed.

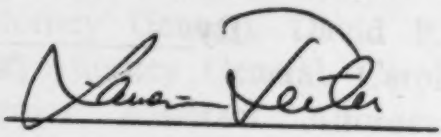
## CONCLUSION

For the foregoing reasons, it is respectfully

requested that the Court grant the instant Petition for Writ of Certiorari.

Respectfully Submitted,

DATED: July 18, 2000



LAWRENCE TEETER
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BRUCE MOORE

APPENDIX A

FILED
January 31, 2000
By_____
Deputy

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

No B124938
(Los Angeles County)

Plaintiff and Respondent,
Superior Court No. BA162022

V.

BRUCE MOORE,

Defendant and Appellant.

_____/

APPEAL from a judgment of the Superior Court of Los Angeles County, Morris B. Jones,

Judge. Affirmed.

Dain & Li and Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, Herbert S. Tetef, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Bruce Moore was convicted by a jury of five counts of second degree robbery with the personal use of a firearm (Pen. Code, §§ 211, 12022.53) and five counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)) with findings that he had personally used a handgun within the meaning of Penal Code section 12022.5, subdivision (a)(1) as to all ten counts. The facts of this case are not in dispute. It will suffice to observe that appellant was involved in a "take over" robbery of a fast food restaurant in Los Angeles on January 8, 1998, pointing a gun at several employees and obtaining money not only from the register but from sales of the drive-through window while appellant waited for the manager to open the time-delay safe. Unfortunately for appellant, the time delay allowed an employee to notify the police, who responded and arrested appellant.

In a second, separate phase, the jury found that appellant had suffered two prior juvenile

adjudications which qualified as "strikes" within the meaning of Penal code sections 1170.12 and 667, subdivisions (b) through (i) (hereinafter referred to as the Three Strikes law). Appellant was sentenced to a term of 135 years of life. He appeals, contending that the evidence is insufficient to support the finding that his two prior juvenile adjudications qualified as strikes, that the court erred in instructing the jury about the priors, and that his sentence constitutes cruel and unusual punishment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Second Amended Information alleged that appellant had suffered the following prior juvenile convictions:

"Case No. Code/Statute Conv. Date ...
"J308152 PC211
03/02/1990 ...
"J308152 PC245(a)(1) 09/02/1988
...."

In the second phase of the proceeding, the prosecutor introduced various documents to prove the prior convictions. Among the documents introduced are the following:

*The Section 245(a)(1) Prior:*

Exhibit 19: A petition fled August 15, 1988, case No. J308152 charging Bruce Michael Moore, a minor, with two counts. The first count alleged that "[o]n or about August 11, 1988, . . . said minor did willfully and unlawfully commit an assault upon HERBERT SCOTT, with a deadly weapon, to wit, a STICK, and by means of force likely to produce great bodily injury, thereby violating Section 245(a)(1) of the Penal Code, a Felony." The second count charged appellant with violation of Penal Code section 594, subdivision (b)(3), a misdemeanor.

Exhibit 20: A minute order dated September 2, 1988, reflecting that the petition filed August 15, 1988 (exhibit 19) was found true.

Exhibit 24: A probation report the subject of which is appellant and his August 15, 1988, juvenile petition.

*The Section 211 Prior*

Exhibit 22: A minute order dated September 21, 1988, referencing case No J308152 and finding as true a petition filed on June 15, 1988, charging Bruce Michael Moore with violations of Penal Code sections 211 and 243, subdivision (a).

Exhibit 17: A petition filed on October 26, 1989, case No. J308152, charging Bruce Moore, a minor, with two counts. The first alleged that "[o]n or about July 11, 1989, . . . said minor did willfully,

unlawfully, and by means of force and fear take personal property from the person, possession, and immediate presence of BINNIE BURNETT, thereby violating Section 211 of the Penal Code, a Felony,"

Exhibit 18: A minute order of March 2, 1990, referencing the petition of October 26, 1989, and committing Bruce Michael Moore to the California Youth Authority with a finding that both counts alleged in the petition are felonies. The minute order reflects a commitment not to exceed 8 years 10 months and lists the following offenses for which appellant was committed:

"PF 6-15-88 Count 1 211 PC 5 years
Count 2 242/243(a) 2 months
"PF 8-15-88 Count 1 245(a)(1) 1 year
Count 2 594(b)(3) 2 months
"PF 7-14-88 Count 2 10851VC 8 months
"PF 8-18-89 Count 1 12101(b) 2 months
"PF 10-26-89 Count 2 10851VC 8 months
"PF 1-12-90 San Bernardino 211 PC 1 year, Count 1"

Exhibit 16: A number of documents including a copy of Exhibit 18 and three other minute orders dated April 2, 1990, June 19, 1990, and August 3, 1990. As pertinent, the minute order of April 2, 1990 states: "It appearing to the court that through inadvertence and clerical error the minute order dated 3-2-90 does not properly reflect the orders of the courts, said minute order is ordered

corrected nunc-pro-tunc as follows: By adding: The offense is not a 707(B) offense."

The minute order of June 16, 1990, reflects the following: "It appearing to the court that through inadvertence and clerical error the minute order dated 4-2-90 does not properly reflect the [] orders of the court, said minute order is ordered corrected nunc pro tunc as follows: [¶] By deleting: The offense is not a 707(B) offense. [¶] By adding: The offense in the 8-15-88 petition is a 707(B) offense." The minute order of August 3, 1990, states: "The minute order of 3-2-90 is amended to reflect 'This is a 707b offense.'"

The jury verdict form found as true that appellant had been convicted "of a serious or violent felony or juvenile adjudication on March 2, 1990, of the crime of Robbery, in Violation of Penal Code Section 211 under case J308152, within the meaning of Penal Code Sections 1170.12(a)-(d) and 667(b)-(i). . . ." In connection with the assault charge, it found that appellant "suffered a prior conviction of a ser[i]ous or violent felony or juvenile adjudication on September 2, 1988, of the crime of Assault with a Deadly Weapon *or* Force Likely to Produce Great Bodily Injury, in violation of Penal code Section 245(a)(1) under case J308152, within the meaning of Penal Code Sections 1170.12(a)-(d) and 667(b)-(i) to be True." (Italics added.)

## DISCUSSION

Pursuant to Penal Code sections 667 and 1170.12, a juvenile adjudication qualifies as a strike under the Three Strikes law if:

> "(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.
>
> "(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or [is a serious offense as listed in Penal Code section 1192.7 or a violent offense listed in Penal Code section 667.5, subdivision (c)].
>
> "(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.
>
> "(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code." (Pen. Code, § 667, subd. (d)(3) and 1170.12, subd. (b)(3). For convenience, in the remainder of this opinion we refer to these requirements by their paragraph designations, i.e., Paragraph (B) or Paragraph (D).)

Appellant contends that the evidence does not support the jury findings that his two prior

convictions qualified as "strikes" pursuant to these provisions and that the jury was not properly instructed on the issue. We turn first to the instruction argument.

1. *Jury Instructions*

Appellant contends that because there are numerous factual considerations in determining whether a prior juvenile adjudication qualifies as a strike, the factors enumerated within the statutory language of Penal Code sections 1170.12, subdivision (b)(3) and 667, subdivision (d)(3), should have been given to the jury. Effectively, appellant argues that whether the prior convictions qualify as strikes is a jury issue. We disagree.[1]

---

[1] There is no indication in the record that appellant's trial counsel requested additional instructions on the prior convictions nor did he object to the instructions given. The record rejects that the jury was instructed with a modified version of CALJIC No. 17.26, as follows: "Now, the defendant Bruce Michael Moore was accused in the information of having violated charges of Penal Code section 211, robbery, and 245(b), assault with a deadly weapon, and the jury has now returned verdicts of guilty as to those particular charges. (¶) It is also alleged in the information that the defendant Bruce Michael Moore previously had been convicted of a violation of Penal Code section 211, robbery, on March 2, 1990, and a violation of Penal Code section 245(a)(1), assault with a deadly Weapon on September 2nd, 1988. (¶) You must now determine the truth of these allegations. (¶) In considering this question, yon must not be influenced by the previous conviction 211 Penal Code, robbery, or 245(b), assault with a semiautomatic firearm on which you have already returned a verdict or any evidence received in support of that allegation. (¶) You must consider each of the alleged prior convictions separately. The People have the burden of proving the truth of these allegations. (¶) If you have a reasonable doubt as to whether such alleged prior convictions are true, you must find the allegations to be not true. (¶) Include a special finding on the question using a form that will be supplied to you."

In *People v. Kelii* (1999) 21 Cal.4th 452, the Supreme court addressed the issue of whether it is the judge or the jury which determines whether an alleged prior conviction qualifies as a "strike" for purposes of the Three Strikes law. The issue was addressed in connection with Penal Code sections 1025 and 1158.[2] The court concluded that it is the role of the jury to determine whether the defendant *has suffered* prior conviction alleged and the role of the court to determine whether the conviction qualifies as a strike:

> "Sometimes the determination does have a factual content, just as the question whether convictions were brought and tried separately has a factual content. As we explained in *Woodell*,[3] 'Sometimes the definition of the

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2 As pertinent, section 1025, subdivision (b) provides that if a defendant has denied tile allegation of a prior conviction "the question of whether or not the defendant has suffered the prior conviction shall V tried by the jury that tries the issue upon the plea of not guilty, . . . or by the court if a jury is waived." Subdivision (c) of the same section provides: "Notwithstanding the provisions of subdivision (b), the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury."

As pertinent, section 1158 provides: "Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether a not he has suffered such previous conviction."

3 *People v. Woodell* (1998) 17 Cal.4th 448.

qualifying prior conviction is not completely congruent with the definition of the crime of which the defendant has been convicted. For example, in [*People v. Guerrero* (1988) 44 Cal.3d 343 . . .], the alleged prior conviction was for burglary of a residence.' (Citation to *Guerrero.*] The statutory use of the phrase, 'burglary of a residence,' posed a problem because "there is no offense specifically so defined in the Penal code.' [Citation to *Guerrero.*] A particular burglary conviction might or might not have involved a residence.' *(People* v. *Woodell, supra,* 17 Cal.4th at p. 452.)

"But these factual questions are of limited scope. In determining whether a prior conviction is serious, 'the trier of fact may look to the entire record of the conviction' but '*no further.*' *(People v. Guerrero, supra,* 44 Cal.3d at p. 355, original italics.) Thus, no witnesses testify about the facts of the prior crimes. The trier of fact considers only court documents. It is true that sometimes the trier of fact must draw inferences from transcripts of testimony or other parts of the prior conviction record. [Citation.] But the factual inquiry, limited to examining the court documents, is not significantly different from

> the one we considered in *Wiley*. '[S]uch facts generally are readily ascertainable upon an examination of court documents. This is the type of inquiry traditionally performed by judges as part of the sentencing function.' [Citation.] Accordingly, the statutory right to have a jury decide whether the defendant 'has suffered' (§§ 1025, 1158) the prior conviction does not include the inquiry whether the conviction qualifies as a strike." *(People v. Kelii, supra,* 21 Ca1.4th at pp. 456-457.)

While *Kelii* did not address the issue in connection with a juvenile conviction, we believe the same result would have obtained. Of the four paragraphs listed in Penal Code sections 1170.12, subdivision (b)(3) and 667, subdivision (d)(3), only paragraph (A) provides a purely factual determination. The rest of the paragraphs require recognition of legal principles. As in *Kelii,* this is the type of inquiry traditionally performed by judges as part of the sentencing function.

We conclude that whether a prior juvenile adjudication qualifies as a "strike" is an issue to be decided by the court and not the jury.

2. *The Prior Convictions As Strikes*

In the recent case of *People* v. *Garcia* (1999) 21 Ca1.4th 1 (hereafter *Garcia*), the Supreme Court closely examined the provisions of Penal Code sections 667, subdivision (d)(3) and 1170.12, subdivision (b)(3) and concluded as follows: "In

brief, we interpret paragraph (B) as setting out the list of prior juvenile offenses that will qualify as strikes and paragraph (D) as requiring, in addition, that in the prior juvenile proceeding giving rise to the qualifying adjudication the juvenile have been adjudged a ward of the court because of a Welfare and Institutions Code section 707(b) offense, whether or not that offense is the same as the offense currently alleged as a strike." (*Id* at p. 6.) In other words, a juvenile conviction may qualify as a "strike" pursuant to Paragraph (B) as long as the juvenile suffering the conviction was adjudged a ward of the juvenile court pursuant to one of the crimes listed in section 707, subdivision (b), at this same proceeding, whether or not the crime for which the juvenile was adjudged a ward of the court qualifies as a "strike." We now turn to the issues raised.

Appellant's opening brief was filed on April 26, 1999, before *Garcia* was decided. In his opening brief, appellant argued that his robbery conviction was for "simple robbery" in that it did not reflect it was committed while armed with a dangerous or deadly weapon" as required by Welfare and Institutions Code section 707, subdivision (b) (hereafter referred to as section 707(b)). He concluded that because section 707(b) was listed in both Paragraphs (B) and (D), before a prior juvenile adjudication qualified as a strike it must be for a crime listed in 707(b). This is the argument which was rejected by *Garcia.*

Respondent also filed its brief after *Garcia* was decided, cited *Garcia,* and conceded that the prior juvenile conviction did not qualify as a strike because "the prosecution presented no evidence that appellant was armed with a deadly or dangerous weapon when he committed the robbery, as required in [section 707(b)], or that the juvenile court declared the offense a [section 707(b)] offense."

This matter was scheduled for oral argument on November 18, 1999. Both sides waived oral argument and the matter was submitted on that date. On December 3, 1999, we vacated submission of the matter and asked for further briefing pursuant to Government Code section 68081 on the following issue:

> "Pursuant to *People* v. *Garcia* (1999) 21 Cal.4th 1, would appellant's prior adjudication for robbery on March 2, 1990, qualify as a strike since (1) robbery is listed as a serious felony under Penal Code section 1192.7(c)(19) and (2) a nunc pro tunc order (Trial Exhibit 16) amended the March 2, 1990 minute order to add the sentence "The offense in the 8-15-88 petition is a 707(b) offense?"

The parties have provided us with further briefing. Not surprisingly, the parties are at odds in their responses. Appellant apparently concedes that the robbery conviction does qualify as a "strike" pursuant to Paragraph (B) of the respective Three

Strikes laws and focuses on the issue of whether appellant's adjudication as a ward of the court was pursuant to a crime delineated within section 707(b), as required in Paragraph (D). Respondent withdraws its concession and argues that the prior conviction does qualify as a "strike" under Paragraph (B) and that the record reflects appellant was adjudicated a ward of the court for a crime listed within section 707(b). We now review the record.

The Two Alleged Crimes as Strikes Pursuant to Paragraph (B)

Simple robbery is listed as a "serious felony" in Penal Code section 1192.7, subdivision (c)(19). Exhibits 17 and 22 identify two robbery adjudications, one relating to a petition filed on June 15, 1988, and one relating to a petition filed on October 26, 1989, both of which are listed in the minute order of March 2, 1990, Exhibit 18. As such, the record supports two qualifying robbery "strikes" pursuant to the terms of Paragraph (B).

With respect to the adjudication for assault, Penal Code section 1192.7 includes in its list of serious felonies "[a]ny felony in which the defendant personally used a dangerous or deadly weapon." Exhibit 19 charged that appellant "did willfully and unlawfully commit an assault upon [the victim], with a deadly weapon, to wit, a STICK, *and* by means of force likely to produce great bodily injury, thereby violating Section 245(a)(1) of the Penal Code, a Felony." (Italics added.) The jury was also given a copy of the probation report, which indicated that

appellant had told the probation officer that his companion threw a bicycle at a truck, breaking the windshield. When the driver got out of the truck he was holding an axe and tried to kick appellant in the chest. Then appellant grabbed a pole and hit the driver with it.[4]

Appellant argues first that the statements in the probation report constitute inadmissible hearsay. Next, he argues that it is not clear from these exhibits whether the finding in the juvenile adjudication of use of force likely to produce great bodily injury was based on the act of aiding and abetting the throwing of the bicycle through the windshield or the act of using of the stick. As a result, the prosecution did not prove whether the juvenile adjudication was for a serious felony.[5]

As for appellant's first argument, the probation report did not constitute inadmissible hearsay.[6] "[I]n determining the truth of a prior-conviction allegation, the trier of fact may look to the

---

[4] A fingerprint expert also testified that appellant's fingerprints matched those taken in conjunction with the prior robbery charge and a prior vehicle theft charge.

[5] Appellant also raised an equal protection argument that pursuant to Welfare and Institutions Code section 707, subdivision (b) his assault conviction may qualify as a "strike" while an adult conviction of an assault may not so qualify under Penal Code section 1192.7. Because we conclude that the facts of appellant's conviction fall within the definition of a serious felony pursuant to Penal Code section 1192.7, we do not address the argument further.

[6] Although both parties concede in their briefs that at trial defense counsel did not object to the probation report, the record is somewhat confusing since it appears that the *prosecutor* unsuccessfully attempted to object to the probation report.

entire record of the conviction." *(People* v. *Guerrero, supra,* 44 Cal.3d at p. 345.) A probation report is considered part of the record of conviction and therefore his statements contained in that report were admissions properly received as evidence. *(People* v. *Mobley* (1999) 72 Cal.App.4th 761, 796 (review den.), citing *People* v. *Monreal* (1997) 52 Cal.App.4th 670, 680-682.) Based on this report of appellant's statements, the "personal use" element of Penal Code section 1192.7 was established. . . .

As for appellant's second argument that there was insufficient evidence of the use of a stick, the juvenile court petition alleged specifically that appellant committed the assault with a stick, not a bicycle. The minute order, Exhibit 20, indicates that the court found the entire petition to be true. We conclude that the evidence supports the conclusion that this adjudication falls within the terms of Paragraph (B).

Whether Appellant was Adjudged a Ward Pursuant to Section 707(b)

Pursuant to Paragraph (D), before appellant's prior adjudications may qualify as "strikes," he must have been adjudged a ward of the court because he committed an offense listed in section 707(b).

The original minute order of March 2, 1990, was silent on the issue. On April 2, 1990, a new minute order was prepared ordering that the minute order dated March 2, 1990, should reflect that the offense is not a 707(B) offense." This was then

subject of a minute order dated June 19, 1990, which deleted the foregoing nunc pro tunc order and added that "[t]he offense in the 8-15-88 petition is a 707(B) offense." The petition of August 15, 1988, is the one charging appellant with violations of Penal Code sections 245, subdivision (a)(1) and 594, subdivision (b)(3). Welfare and Institutions Code section 707, subdivision (b)(14) lists "Assault by any means of force likely to produce great bodily injury." As previously noted, the petition of August 15, 1988, alleged that appellant assaulted the victim with a deadly or dangerous weapon *and* by means of force likely to produce great bodily injury. The petition was found to be true in its entirety. This is one of the crimes listed in Exhibit 18, when appellant was committed to the Youth Authority. Thus, the record supports the conclusion that appellant's adjudication on March 2, 1990, was for a section 707(b) crime.

Appellant argues that to the extent the nunc pro tunc order of June 19, 1990, was an attempt by the trial court to make an adjudication, rather than merely to correct a clerical error, the court acted in excess of jurisdiction. We do not read the record in that light. The original nunc pro tunc order was made one month after the order of March 2, 1990, the next one was made within ten weeks of the first, and the final one was made within six weeks from the second. There is no indication in the record to indicate that the orders were anything other than to correct clerical errors.

3. *Cruel and Unusual Punishment*

Appellant argues that his sentence of 135 years to life is cruel and unusual in that it violates the principle of proportionality contained within the Eighth Amendment to the United States Constitution and article 1, section 17 of the California Constitution.

Appellant cites and relies upon *Solem* v. *Helm* (1983) 463 U.S. 277 for his claim that his sentence violates the Eighth Amendment to the United States Constitution. A similar argument was raised and rejected in *People* v. *Ayon* (1996) 46 Cal.App.4th 385 (disapproved on another point in *People* v. *Deloza* (1998) 18 Cal.4th 585), a case with which we agree. In *Ayon*, the defendant received a sentence of 240 years to life for a crime spree resulting in his conviction of seven counts of robbery, two counts of attempted robbery and two counts of possession of a firearm by a felon. The court stated:

> "Ayon's reliance on *Solem* is weakened by *Harmelin* v. *Michigan* (1991) 501 U.S. 957, the high court's most recent statement on whether the Eighth Amendment to the United States Constitution includes a proportionality guarantee in noncapital cases. In *Harmelin*, a life sentence without possibility of parole for possessing 672 grams of cocaine was upheld. While *Harmelin* did not contain a majority opinion with respect to the issue, two justices concluded the Eighth Amendment contains no

proportionality guarantee [citation] and three other justices concluded the Amendment forbids only those sentences that are 'grossly disproportionate' to the crime [citation]. Even those justices recognizing a guarantee of proportionality review stressed that, outside the context of capital punishment, successful challenges to particular sentences are 'exceedingly rare' because of the relative lack of objective standards concerning terms of imprisonment.' [Citation.]

"We also find *Solem* v. *Helm, supra,* 463 U.S. 277, is not controlling here because in that case the high court focused on the nonviolent nature of the defendant's current offense of uttering a 'no account' check ('one of the most passive felonies a person could commit') and his prior offenses. [Citation.] The high court observed a life sentence for fourth time heroin dealers and other violent criminals would pass constitutional muster. [Citation.] Ayon's current offenses - seven armed robberies and two attempted robberies - stand in marked contrast to the defendant's crimes in *Solem.*

"Both in this jurisdiction and in other jurisdictions, habitual offender statutes have long withstood the constitutional claim of cruel and/or unusual punishment. [Citation.]

> The United States Supreme Court addressed the constitutionality of a Texas recidivist statute requiring life imprisonment upon conviction of a third felony in *Rummel* v. *Estelle* [(1980)] 445 U.S. 263. Over the course of nine years, Rummel had been convicted of fraudulently using a credit card to obtain $80 worth of goods or services, passing a forged check in the amount of $28.36 and obtaining $120.75 by false pretenses. [Citation.] In response to Rummel's argument that life imprisonment was 'grossly disproportionate' to three felonies he had committed, the high court concluded the mandatory life sentence did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. [Citation.] When Ayon's current offenses (seven armed robberies and two attempted robberies) and prior felony convictions (four residential burglaries) are contrasted with the crimes at issue in *Rummel*, it readily appears the magnitude of Ayon's criminal activity significantly dwarfs the magnitude of Rummel's crimes." *(People* v. *Ayon, supra,* 46 Cal.App.4th at pp. 396-397.)

Appellant cites and relies upon the cases of *In re Lynch* (1972) 8 Cal.3d 410 and *People* v. *Dillon* (1983) 34 Cal.3d 441, among others, for the proposition that his sentence constitutes cruel and

unusual punishment under the California Constitution, article 1, section 17. The court in *Ayon* reviewed the issue in connection with these same cases and concluded that the sentence did not violate the California Constitution. As pertinent, the opinion provides the following discussion.

> "*In re Lynch* applied a three-pronged approach to determine whether a particular punishment is disproportionate to the offense for which it is imposed. *(In re Lynch, supra,* 8 Cal.3d at pp. 429-438.) Under the first prong, the court examines the 'nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' *(Id.* at p. 425.) Second, the court compares the challenged punishment with punishments prescribed for more serious crimes in the same jurisdiction. *(Id.* at p. 426.) Finally, the challenged punishment is compared with punishments for the same offense in other jurisdictions. *(Id.* at p. 427.)
>
> "The Supreme Court in *People* v. *Dillon* refined the first prong of the *In re Lynch* analysis. As to evaluating the nature of the offense, court should examine 'not only the offense in the abstract' but also 'the facts of the crime in question.' (*People v. Dillon, supra,* 34 Cal 3d at p. 479.) Courts should consider the 'totality of the circumstances,'

including motive, the way the crime was committed, the extent of the defendant's involvement, and the consequences of the defendant's acts. *(Ibid.)* With respect to the nature of the offender, a court should ask whether '. . . the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.' *(Ibid.)*

"The analysis developed in *In re Lynch* and *People v. Dillon* merely provides guidelines for determining whether a given punishment is cruel or unusual and the importance of each prong depends on the facts of the specific case. [Citation.] Determinations whether a punishment is cruel or unusual may be made based on the first prong alone. [Citations.] The defendant has the burden of establishing that his punishment is greater than that imposed for more serious offenses in California and that similar offenses in other states do not carry punishments as severe. (See *In re DeBeque* [(1989)] 212 Cal.App.3d [241] at pp. 254-255.)

"
. . .

"Recidivism in the commission of multiple felonies poses a manifest danger to society

> justifying the imposition of longer sentences for subsequent offenses. [Citation.] In discussing recidivist statutes, the United Sates Supreme Court has stated: 'The purpose of a recidivist statue . . . is . . . to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.' *(Rummel* v. *Estelle, supra,* 445 U.S. at pp. 284-285 [63 L.Ed.2d at p. 397].)" *(People* v. *Lyon, supra,* 40 Cal.App.4th at pp. 398-399.)

In application of the foregoing, we note that appellant has not presented an analysis in his briefing regarding disproportionality of appellant's sentence to other more serious offenses in California,

or to similar sentencing schemes in other states, the second and third prongs within *Lynch*. We therefore concentrate on the first prong: the nature of the current offenses and the offender, with regard to the degree of danger both present to society.

Appellant's *ten* current convictions result from a "take over" robbery of a fast food restaurant, with use of a firearm, with five separate victims, and during a time when the restaurant was still serving food to drive through customers. The potential for significant injury to the victims cannot be understated. In addition, appellant's prior criminal history is desultory. The record reflects juvenile adjudications beginning in 1988 and carrying through March 2, 1990, when he was incarcerated at the California Youth Authority for a term not to exceed 8 years 10 months. Exhibit 18 lists eight separate crimes, three of which were for robbery, and one for assault with a deadly weapon and with force likely to produce great bodily injury. Exhibit 15, a computer-generated "rap sheet" shows appellant was convicted in 1997 of carrying a loaded firearm in public. In short, appellant is the type of person at which the Three Strikes law was aimed. We conclude appellant's sentence is not cruel and unusual.

## DISPOSITION

The judgement is affirmed.
NOT TO BE PUBLISHED

HASTINGS,

J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, Josh.

# APPENDIX B

Second Appellate District, Division Four, No.
B124938
S086729

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

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THE PEOPLE, Respondent

v.

BRUCE MOORE, Appellant

SUPREME COURT

FILED
APRIL 19 2000
Frederick K. Ohlrich
Clerk
DEPUTY

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Appellant's petitions for review DENIED

Mosk, J. is of the opinion the petition should be granted.

GEORGE (Signed)
Chief Justice